APPEAL FROM APPELLATE DECREE No.541 OF 1988

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Against the judgment and decree dated 05.08.1988 passed by Shri Satyendra Kumar Gupta, 2nd Additional District Judge, West Champaran, Bettiah in Title Appeal No. 18 of 1979 reversing the judgment and decree dated 20.02.1979 passed by Shri Raj Kumar Tuli, 3rd Additional Subordinate Judge, Bettiah in Title Suit No. 299 of 1974(04 of 1978).

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LAXMI DEVI & ORS.	---	Appellants.
	Versus	
MALTI DEVI & ORS.	---	Respondents.

For the appellants : M/s Vinod Shankar Modi, Kamal Kishor Singh and Manoj Kumar Singh,Advocates.

For the respondents : M/s Shiv Nandan Rai, Sr. Advocate and Narmedeshwar Jha,Advocate.

P R E S E N T

HON'BLE MR. JUSTICE S.N. HUSSAIN

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S.N. Hussain, J. This second appeal has been filed by defendant no.2-respondent-appellant against the judgment and decree of the learned court of appeal below.

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2. This matter arises out of Title Suit No. 39 of 1972(29 of 1974) (04 of 1978) which was filed by the sole plaintiff-appellant-respondent no.1 on 05.02.1972 for declaration that the registered sale deed dated 03.09.1966(Ext.C) executed by the plaintiff in favour of defendant no.2 was forged, fabricated and not binding upon the plaintiff and also for partition of her 1/5th share in the suit properties detailed in Schedule-II of the plaint and also for mesne profit, etc.

3. The claim of the plaintiff was that Schedule-I land was joint family property of plaintiff and defendants and defendant no.2 wanted the plaintiff to sell her share in it but she refused. It was also claimed that sometimes in January, 1972 she came to know from Sukhdeo Prasad that defendant no.2 was claiming Schedule-II lands on the basis of a registered sale deed dated 03.09.1966 alleged to have been executed by the plaintiff in favour of defendant no.2, although the plaintiff had never executed any such document which was forged, fabricated and without consideration. The plaintiff further claimed that she had never taken any permission to sell the land from the authority concerned, although consolidation proceeding was

going on. It was also claimed that plaintiff was feeling difficulty in joint possession of the ancestral property and hence she sought partition, which was refused by defendants.

4. The suit was contested by defendant no.2 claiming that the said sale deed dated 03.09.1966 was genuine, valid and for consideration duly executed by the plaintiff after taking permission for sale from the authority concerned and she admitted her execution before the Sub-Registrar after receiving the entire consideration money. It was also claimed by defendant no.2 that due to close relations, the plaintiff, her daughter-in-law and her son-in-law had access to his house and they stealthily took away the original sale deed from the possession of defendant no.2 and filed the suit with nefarious intentions. Other defendants also filed their written statement but they merely claimed that there had already been a partition of the family properties, including the suit land by metes of bounds.

5. On the basis of the respective pleadings of the parties to the suit, the learned trial court framed the following issues:

(i) Is the suit as framed maintainable?
(ii) Has the plaintiff got any valid cause of action?
(iii) Is the suit barred under the law of Specific Relief Act, estoppel, waiver, acquiescence and mis-joinder of cause of action?
(iv) Is the suit barred by limitation?
(v) Is the registered sale deed dated 03.09.1966 said to be executed by the plaintiff in favour of defendant no.2 for the suit land, genuine, valid and for consideration and is it binding on the plaintiff?
(vi) Is the plaintiff entitled to get a decree for partition of Schedule-I land, if so, to what extent?
(vii) To what other relief(if any) the plaintiff is entitled to?
(viii) Is the plaintiff entitled to get mesne profits, if so, to what extent?

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6. With respect to the aforesaid issues, evidences were led and arguments were made by the parties to the suit, whereafter the learned Additional Subordinate Judge-3, Bettiah dismissed the said title suit vide judgment and decree dated 20.02.1979 after arriving at the following findings:

(a) Admittedly the plaintiff had a share of 12 kathas in the suit properties and if the impugned sale deed is not avoided she cannot get a partition decree.
(b) The sale deed is not a void document rather it is an avoidable document and if the plaintiff wants to avoid it on the basis of fraud, the plaintiff should have come within three years of its execution, hence the suit is barred by limitation.
(c) The documentary evidence of the plaintiff does not support her pleading.

(d) Registered sale deed dated 03.09.1966(Ext.C) is genuine, valid and for consideration and is binding on the plaintiff because the partition of suit orchard is admitted by PWs. and the plaintiff has already transferred her share in Schedule-I land hence plaintiff is not entitled to get any partition decree.
(e) Suit as framed is not maintainable and the plaintiff has got no cause of action nor she is entitled to any relief.
(f) Plaintiff is not entitled to get any mesne profit because the defendant had got a right to come in possession over his purchased suit land.
(g) Defendants had not pressed issues with regard to any bar to the suit under the provision of Specific Relief Act, estoppel, waiver, acquiescence and mis-joinder of the cause of action.

7. The aforesaid judgment and decree of the trial court was challenged by the plaintiff in Title Appeal No. 18 of 1979. This title appeal was allowed by learned 2nd Additional District Judge, West Champaran vide his judgment and decree dated 13.07.1982 by which the judgment and decree of the learned trial court was set aside and the claim of the plaintiff was decreed in part holding that the impugned sale deed was forged, fabricated and not binding on the plaintiff and also allowed the plaintiff's claim of partition. However, the plaintiff's claim for mesne profit was rejected by that court.

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8. Second Appeal No. 317 of 1982 was filed by defendant no.2 against that part of the aforesaid judgment and decree of the learned court of appeal below by which his sale deed was declared to be forged and fabricated and plaintiff's claim for partition was allowed. Similarly, Second Appeal No. 403 of 1982 was filed by the plaintiff against that part of the aforesaid judgment and decree of the learned court of appeal below by which her claim for mesne profit was rejected. This court vide order dated 12.12.1986 disposed of both the aforesaid second appeals, setting aside the judgment and decree of the learned appellate court and remanded the case to it for fresh consideration of evidence regarding the question of knowledge of forgery and the question of mesne profit .

9. After remand the learned 2nd Additional District Judge, West Champaran again took up T.A. No. 18 of 1979 and after considering the said order of this court dated 12.12.1986 as well as the pleadings of the parties framed following issues for decision in the said title appeal:

(i) Whether the plaintiff had knowledge of the alleged forged and fabricated sale deed dated 03.09.1966 purported to have been executed by her in January, 1972 as claimed by the plaintiff?
(ii) Whether the plaintiff's suit is barred by limitation?
(iii) Whether the sale deed dated 03.09.1966 purported to have been executed by the plaintiff in favour of defendant no.2 was executed by her and whether it is a forged and fabricated document?
(iv) Whether the plaintiff is entitled to a decree for partition to the extent of 1/5th share in Schedule-I property?
(v) Whether the plaintiff is entitled to a decree for the mesne profit, if so to what extent?

10. Thereafter both the parties argued their respective cases on the aforesaid issues and after considering the pleadings and materials on record, the learned 2nd Additional District Judge, Bettiah vide his judgment and decree dated 05.08.1988 allowed the title appeal on contest with cost, setting aside the judgment and decree of the trial court and declaring registered sale deed dated 03.09.1966(Ext.C) to be forged, fabricated and not binding upon the plaintiff who was found entitled to partition of her 1/5th share in Schedule-I property and also to mesne profit at the rate of Rs.550 per annum from 1973 on the basis of the following findings:

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(a) No specific evidence adduced by defendant no.2 to show that plaintiff had knowledge of the sale deed prior to January, 1972.
(b) Plaintiff got knowledge of the sale deed in question in January, 1972.
(c) The suit was filed within three years of the knowledge of the forgery and therefore, the suit is not barred by law of limitation.
(d) The evidence and circumstances sufficiently go to show that defendant had an evil eye on the share of the plaintiff in the orchard in question.
(e) Sale deed (Ext.C) is forged and fabricated document which was brought in existence by the defendant by getting the same executed by some other lady in place of the plaintiff.
(f) Admittedly the plaintiff's share in Schedule-1 property is to the extent of 1/5th share, hence, plaintiff is entitled to a decree of partition to the said extent.
(g) From the evidence it appears that plaintiff got at least Rs.550.00 in one year, hence, she is entitled to mesne profit at the same rate every year since 1973.

11. Against the aforesaid judgment and decree of the learned lower appellate court, defendant no.2 has filed the instant second appeal on 11.10.1988, whereafter it was admitted by this court on 27.02.1996 framing the following substantial questions of law:

(i) Whether the appellate court while reversing the judgment of the trial court has considered the material evidence/reasons

relied upon by the trial court in dismissing the plaintiff's suit?

(ii) Whether in absence of examination of Sukhdeo Prasad, the finding about the knowledge of the alleged execution of the sale deed is sustainable in law, specially when there is no material on the record to show that aforesaid Sukhdeo Prasad is dead?

(iii) Whether the appellate court was justified in granting mesne profit from 1973 when the claim itself is from 1975?

12. So far question no.(i) is concerned, the learned court of appeal below while reversing the judgment and decree of the learned trial court has considered the entire material evidence adduced by the parties in paragraphs-9 to 36 of its judgment and only thereafter decided the points involved in the title appeal and has also considered the reasons of the learned trial court and has found them to be untenable in view of the pleadings and evidence on record, whereafter the judgment and decree passed by the learned trial court was set aside. In the said circumstances, this question raised by the appellants is absolutely frivolous and baseless.

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13. So far question no.(ii) raised by the appellants is concerned, the learned court of appeal below has specifically held that the plaintiff(PW.15) appears to be an illiterate Pardanashin widow and in her cross-examination also, she has stated that she remains in Parda and she does not even talk to people of Mohulla and the mortgage deed (Ext.6) executed by her also shows that she admitted the receipt of consideration money of the deed before the Sub-Registrar behind Parda, hence, in such circumstances the onus was cast on the defendants to prove that the sale deed was executed by the plaintiff. Furthermore after discussing the entire evidence on record, the learned court of appeal below had come to a specific conclusion that defendant no.2 failed to prove the same as original sale deed(Ext.C)was not even produced by defendant no.2. It was also held that as per the report of the experts and on comparison by the court itself the L.T.I. of the plaintiff on the sale deed in question did not tally with her admitted L.T.I. The plaintiff categorically stated in her evidence that she did not purchase the stamps for the deed nor there is any evidence adduced by defendant no.2 to support his claim that it was the plaintiff, who had actually purchased the stamps. Hence, the learned court of appeal

below rightly came to the conclusion that the said sale deed is forged and fabricated, which was brought in existence by the defendant by getting the same executed by some other lady in place of the plaintiff.

14. So far the question of knowledge about the sale deed in question is concerned, except the execution of the said sale deed and the recitals in Ext.F. , there is no other specific evidence adduced by defendant no.2 showing that the plaintiff had knowledge of the sale deed prior to January, 1972. Furthermore, the plaintiff had clearly stated that she learnt about the deed from Sukhdeo Prasad. Hence, when the plaintiff herself had been examined, the non-examination of Sukhdeo Prasad will not affect the decision of the court in that regard, specially when the sale deed has already been found to be forged and fabricated.

15. So far question no.(iii) is concerned, the learned appellate court has granted mesne profit to the plaintiff from 1973 on the ground that the suit was filed in the year 1972 and from the evidence of PW.15 the payment of price of fruits to the plaintiff in the year 1972 is doubtful, but it was proved that afterwards she did not get the share. In the said circumstances the learned court of appeal was justified in holding that the plaintiff was entitled to get the mesne profit since 1973. So far the quantum of mesne profit is concerned, there is varying evidence. According to some, the plaintiff got Rs.800.00 per year and according to others she received Rs.700.00 per year, whereas some others said that she was given Rs.550.00 per year and the learned court of appeal below has fixed it at the least value Rs.550.00 annually. Hence on this score also the learned court of appeal below has not erred.

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16. On the basis of aforesaid facts, findings and materials, it is quite apparent that there is no illegality in the impugned judgment and decree of the learned court of appeal below. It is also clear from the pleadings and evidence as well as the provision of law that the questions raised by the appellants cannot be legally held to be substantial question of law. Accordingly, this second appeal is dismissed and the judgment and decree of the learned court of appeal below is hereby affirmed, but in the facts and circumstances of this case there will be no order as to cost.

Patna High Court, **(S.N. Hussain, J.)**
Dated, 11th of September, 2008
N.A.F.R./Harish